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## **So mechanical or routine: the not original in *Feist***

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### **Abstract.**

The United States Supreme Court case of 1991, *Feist Publications, Inc. v. Rural Tel. Service Co.*, continues to be highly significant for property in data and databases but remains poorly understood. The approach taken in this article contrasts with previous studies. It focuses upon the not original rather than the original. The delineation of the absence of a modicum of creativity in selection, coordination, and arrangement of data, as a component of the not original, forms a pivotal point in the decision. The article also aims at elucidation rather than critique, using close textual exegesis of the Supreme Court decision. The results of the exegesis are translated into a more formally logical form, in order to enhance clarity and rigor.

The insufficiently creative is initially characterized as, 'so mechanical or routine'. *Mechanical* and *routine* are understood in their ordinary discourse senses, as a conjunction or as connected by AND, and as the central clause. Subsequent clauses amplify the senses of mechanical and routine without disturbing their conjunction.

The delineation of the absence of a modicum of creativity can be correlated with classic conceptions of computability. The insufficiently creative can then be understood as a routine selection, coordination, or arrangement produced by an automatic mechanical procedure or algorithm. An understanding of a modicum of creativity and of copyrightability is also indicated.

The value of the exegesis and interpretation is identified as its final simplicity, clarity, comprehensiveness, and potential practical utility.

### **Introduction**

The decision of the United States Supreme Court in 1991 in *Feist Publications, Inc. v. Rural Tel. Service Co.*, which denied copyright protection to telephone white pages for their lack of creativity (Feist, 1991), has been widely regarded as the most significant of modern intellectual property decisions concerned with effects from modern information technologies (Nimmer, 2009). It dismissed 'sweat of the brow' or 'industrious collection' (Feist, 1991, p.352) as the criterion for intellectual property, insisting on creativity and originality, as the constitutional requirement for copyright. The dismissal of industrious collection places it in tension with the often dominant labor theory of copyright, which had demonstrated its utility by its long endurance and wide

diffusion, for over 200 years in the United States and in other jurisdictions (Breyer, 1970, pp.284-285; *Ager v. Peninsula*, 1884<sup>1</sup>), whatever its imperfections (Breyer, 1970). The Supreme Court was characterized as having ‘dropped a bomb’ on United States copyright law by the then Register of Copyrights, in testimony before the House of Representatives (House of Representatives, 1991; also quoted in Samuelson, 1992, p.27; Polivy, 1998, p.782). In an analogous contemporaneous image – ‘[l]ike the proverbial handful of pebbles dropped in a pond’ – the *Feist* decision was described as having ‘the potential over time to generate a series of widening, if not necessarily concentric, consequences for the basic doctrines of copyright law’ (Raskind, 1992, p.331).

The disruption and discontinuity – ‘dropp[ing] a bomb’ –, the potential for multiple interpretations – ‘not necessarily concentric [...] consequences’ –, and the extensive diffusion – ‘widening ... consequences’ – vividly anticipated by commentators immediately subsequent to the decision have since been amply fulfilled. Disruption and discontinuity for subsequent copyright practice is confirmed by current references to the ‘post-*Feist* era’ (Nimmer, 2009, 1.01[B][2][b]n.48), in the major commentary (Nimmer, 2009). The discontinuity implied by the term ‘post’ is matched by the significance of the discontinuity and of *Feist* itself, understood as the ‘now-governing case’ (Nimmer, 2009, 13.01n.5.1). The absence of concentricity from the consequences of the decision for copyright law is revealed in the contrasting interpretations developed by different circuits (Polivy, 1997-1998). The diffusion of the decision includes its extension to comprehend material not prepared as data for compilations. For instance, a decision, concerned with the use of players’ statistics by newspapers for fantasy baseball, took *Feist* as controlling for considerations of copyright preemption. Baseball players’ names and playing records were considered to be analogous to the ‘names, towns, and telephone numbers in a phone book’ (C.B.C. Distribution, 2006, p.73). Crucially, the decision, in a direct citation to *Feist*, held that statistics of players’ performance lacked the ‘*sine qua non* of copyright – originality’, and refused to allow intellectual property to inhere such data (C.B.C. Distribution, 2006, pp.70, 73).

Commentaries characterized the decision as complex and difficult to interpret – ‘inordinately Delphic even by Supreme Court standards’ (Strong, 1994, p.39)<sup>2</sup> – and explored the internal contradictions of the decision, and its tensions with previous understandings of copyright, without resolving them. A number of commentaries assert that the Supreme Court has grossly misunderstood aspects of copyright, particularly in neglecting its incentive role in rewarding the production of works (Ginsburg, 1992, pp.341 and 350; Branscomb, 1994, pp.38-40) and in elevating creativity to a constitutional requirement for copyright (Narayanan, 1994, pp.341 and 350; Raskind, 1991-1992, pp.331-334; VerSteeg, 1995, p.586). The strong implication of such commentaries is that the Supreme Court severely lacked an understanding of copyright, although this implication is not explicitly stated. Commentaries also attribute an intention to the Supreme Court of encouraging a unified interpretation of property in data by the lower courts, although any such intention has been frustrated rather than fulfilled, by the diversity of subsequent interpretations. Commentaries were published predominantly in the period immediately following the decision, with some diminution in their number in recent years, but the issues they raise remain largely unresolved.

The most persistent, and significant, concern, common to a number of commentaries, is with the poor definition of creativity in the decision (Clifford, 2004; Ginsburg, 1992; Greetham, 1996; Narayanan, 1994; Raskind, 1991-1992; Resnik, 2003; Strong, 1994; VerSteeg, 1995). The discussion of creativity in the decision is considered to be diffuse:

Here, the Court's opinion [where it moves to a discussion of creativity (Feist, 1991, pp.348-349)] loses its almost Wagnerian sense of mastery and descends to platitudes (Strong, 1994, p.45)

The decision does not say what sort of manner of selection and arrangement of facts will reach the standard for protection (Strong, 1994, p.45):

*Feist* demands that we seek creativity in the selecting and arranging of data. This is no small metaphysical task. It requires that we understand the nature of the creative act that goes into making a compilation. (Strong, 1994, p.45)

Further, the need for an understanding of creativity which satisfies ordinary discourse understandings and everyday practice as well as copyright is noted: 'whatever definition we arrive at must satisfy not only the ordinary human meaning of creativity but also the strictures of copyright law' (Strong, 1994, p.45). *Feist* fails to answer the basic question of how intellectual creativity is to be recognized (Clifford, 2004, p.269):

Without a test that concentrates attention on the essence of *Feist* and the nature of human inventiveness – choice making by a human author – too many works that are incomprehensible or unappreciated by the court will be denied copyright protection. (Clifford, 2004, p.299)

Commentaries have noted that the arrangement must not only be original, or not copied from another source, but also creative and that no court, including the Supreme Court, has been able to explicate this standard (Strong, 1994, p.40). The poor definition of creativity is considered to have had significant effects, particularly making it difficult to fulfill the decision's assurance that property will continue to subsist in the 'vast majority of compilations' (Feist, 1991, p.359). Commentaries continue to accept that creativity is poorly defined but they have not developed a more satisfactory and robust concept.

The decision remains law—'Like it or not, *Feist* is the law in the U.S.' (Resnik, 2003, p.309—without prospect of change. The Court itself has not revisited the decision, despite opportunities to do so. The most that can be read from the absence of revisiting is that the Court is not sufficiently dissatisfied with the decision or with its effects, to expend its time in reviewing it. Constitutionally, Congress, as the legislature, cannot immediately override the Supreme Court (Fallon, 1994; Nimmer, 2009, §1.01[B][2][a]). Although there have been a number of proposals for *sui generis* legislation to protect property for data in databases, these have not been passed into law (Trosow, 2004-2005). As current law, the decision requires understanding and elucidation rather than critique or prescriptive counter-proposals.

A careful reading of the decision indicates the crucial concept is not directly creativity or originality, but the not original. The conclusion of the decision states:

We conclude that the names, towns, and telephone numbers copied by Feist were not original to Rural, and therefore were not protected by the copyright in Rural's combined white and yellow pages directory. (Feist, 1991, p.363)

The not original can, then, be regarded as the central component of the rationale, or, in more technical terms, the 'ratio decidendi' of the decision<sup>3</sup> – '[w]e conclude'. On the basis of its crucial role in the decision, the not original can given a pivotal role, made a crux, for an interpretation of the decision as a whole

The original, of which the not original is the negation, is a compound concept. It is constituted by two, more primitive or fundamental concepts, 'independent creation' and 'a modicum of creativity' (Feist, 1991, p.346). Independent creation is the simpler of the two concepts and 'means only that the work was independently created by the author (as opposed to copied from other works)' (Feist, 1991, p.345). Within the decision independent creation is connected with the collection and assembly of data and arises in connection with the refutation of industrious collection as a sufficient basis for copyright. Creativity is the more complex concept, a 'modicum of creativity' is an essential constituent of originality, and arises most strongly in connection with the selection, coordination, and arrangement imposed on the collected and assembled data. The attention given to creativity in the decision is subsequent to the refutation of industrious collection. The absence of a sufficient degree of creativity forms the rationale for denying Rural property in the transformations they imposed on their uncopyrightable data. As a compound concept, the original is constituted by the presence of independent creation and of a sufficient degree of creativity.

The not original is conversely constituted by the absence of independent creation or of a sufficient degree of creativity. The negative of the simpler of the two concepts, independent creation, is not greatly directly addressed within the decision. The absence, or, more strictly, the antithesis to, a sufficient modicum of creativity is delineated in series of consecutive paragraphs towards the end of the decision, with crucial clauses proceeding from 'so mechanical or routine' to 'practically inevitable ... time-honored tradition' (Feist, 1991, pp.362-363). The series of consecutive paragraphs immediately precedes the reference to the not original in the conclusion of the decision, indicating that the absence of creativity is directly subsumed in the not original. The absence of creativity and levels of creativity below that required for copyright are far more clearly and specifically delineated in the decision than creativity itself.

The delineation of the negative of, or antithesis to, a complex and difficult concept is consistent with a classic strategy used by the Supreme Court. Confronted with complex or elusive, but inescapable, concepts – 'the task of trying to define what may be indefinable' (Jacobellis, 1964, p.197) – the Court has resorted to indirect methods of delineation (Fallon, 2004, p.46). In one significant instance, concerned with obscenity, further definition of 'hard-core pornography' was deliberately avoided and a sufficient test for recognition of it – 'I know it when I see it' – substituted (Jacobellis, 1964, p.197). In the case of *Feist*, there is not a comparably clearly articulated avoidance of definition of the complex concept, of creativity, but a focus on, and characterization of, its more definite, and possibly, simpler, antithesis, the absence of creativity, as the final rationale for the denial of property. The problematic history of creativity as a concept in copyright would definitely have been known to the Supreme Court, who cite a

seminal case, *Bleistein v. Donaldson Lithographing Co.* (Bleistein, 1903) (Feist, 1991, p.359), which allowed copyright to inhere in circus posters. The Supreme Court can then be understood as deliberately concentrating on delineating the antithesis to creativity rather than creativity itself, in the knowledge that it was more likely to be open to significant elucidation.

The characterization of the absence of or antithesis to creativity has not been subject to a close exegesis, beyond the recognition of the relative explicitness with which the not original as whole has been delineated. One commentary at least has contrasted the explicitness with which the not original is characterized compared to original – '[t]he *Feist* opinion is more explicit in describing what is not original than in delineating what is' (Ginsburg, 1992, p.343). Commentaries have not seized upon the characterization for exegesis, or, as a further possibility, recognized it as a resource for the clarification of the decision (Nimmer, 2009). The crucial characterization, 'so mechanical or routine', is increasingly frequently cited in widely scattered sources as a central criterion for the absence of property. The combination of recognition of clarity of delineation and the implication of the significance of the clause with an absence of further development promises the potential for a powerful analysis. The analysis can transform the implicit and emerging into the explicit and integrate and unify scattered, but potentially congruent, sources.

The primary, and immediate, focus of this article is, then, on the delineation of absence of sufficient levels of creativity for copyright. Insufficient levels of creativity are understood as a determining constituent of the not original, of the rationale for the decision: that is, a compilation of uncopyrightable facts or data will be not original where its selection, coordination, and arrangement embodies insufficient creativity. The major and initial focus for elucidation is, then, on a central component of the decision, rather than of the decision as whole.

The delineation of the absence of sufficient creativity is, then, more summarily, correlated with an external standard, 'capable of being known' (Holmes, 1881/1991, pp.110-111; Golding, 2005). The intention of establishing a correlation is to enable the delineation of the absence of creativity to become more useful for assigning real world instances of compilations to the not original, approaching a judicially implementable test. The particular correlation established is from a central aspect of insufficient creativity, primarily from the 'so mechanical' in the 'so mechanical or routine', to an automatic mechanical procedure or algorithm. The absence of sufficient creativity can then be clearly and sufficiently understood as embodied in a routine selection, coordination, and arrangement which results from an automatic mechanical procedure.

The implications of this understanding of the absence of sufficient creativity are then anticipated. Creativity can be conversely understood to the absence of creativity, as human activity on meaning which has not been reduced to an automatic mechanical procedure. It is then manifested in a selection, coordination, and arrangement which is not the routine product of an automatic mechanical procedure. A sufficient modicum of creativity, as distinct from creativity itself, can be indicated by the exchange values associated with such a product. The understandings of the absence of sufficient creativity and of a sufficient modicum of creativity can clarify and make specific the assertion of the decision that '[p]resumably, the vast majority

of compilations will pass this test [for ‘some minimal level of creativity’]’ (Feist, 1991, pp.358-359).

## Methodology

The approach is one of elucidation or clarification of obscurity rather than further interpretation, critique, or counter-proposal. The elucidatory character of the approach contrasts with the critiques offered by other commentaries. The underlying assumption of some commentaries that the Supreme Court lacked an understanding of copyright, implausible when explicitly articulated, is rejected<sup>4</sup>. The Supreme Court should, at least as an initial position, be credited with at least as great an understanding of copyright as their commentators and rational, rather than perverse, intentions. Elucidation is understood, in accord with its ordinary discourse sense, as making clearer. The elucidation employs three complementary techniques in a cumulative manner: first, a close textual exegesis to establish the senses of critical terms<sup>5</sup>; secondly, a consideration of the relation between the senses established, including a translation of the relation into more formally logical propositions; and, thirdly and finally, a correlation of the senses and their relation with a real world and more objective correlative.

Two of the techniques for elucidation adopted, of close textual exegesis and correlation, are well established, but the deliberate translation into logical propositions is apparently antithetical to a significant view of the nature of the law. Oliver Wendell Holmes famously and influentially (Stone, 2002; Leiter, 2005) remarked, ‘[t]he life of the law has not been logic: it has been experience’ (Holmes, 1881/1991, p.1). Logic, in this instance, is understood as involving ‘the syllogism’ and as treating the ‘law [which] embodies the story of a nation’s development through many centuries ... as if it contained only the axioms and corollaries of a book of mathematics’ (Holmes, 1881 /1991, p.1). The ‘official theory’, which is exposed as a partial fiction, is ‘that each new decision follows syllogistically from existing precedents’ (Holmes, 1881/1991, p.35). A contrasting, and more positive, understanding of logic as associated with rationality, opposed to more primitive ‘personifying metaphors’ (Holmes, 1881/1991, p.383), coexists with the primary understanding of logic. Logical method itself is endorsed for certain purposes and with certain limitations:

The business of the jurist is to make known the content of the law; that is, to work upon it from within, or logically, arranging and distributing it, in order, from its *summum genus* to its *infima species*, so far as practicable. (Holmes, 1881/1991, p.219)

Logic can, then, be used to give coherence and organization to experience.

Here, formal logic is used consistently with the reservations on its applicability to the law and with its contrasting endorsement. In accord with the priority given to experience, ordinary discourse and discursive expression is treated as primary; consistently with the endorsement of logic as a method for making known the content of the law from within, logical propositions are used to give clearer and more intelligible form to discursively expressed arguments. The logical propositions are not conceived as autonomous from the primary discourse and long inferential sequences within them, which would be characteristic of mathematics, are not introduced.

## Insufficient creativity

The positive characterization of the absence of creativity and of insufficient levels of creativity in the decision can be scrupulously identified and extracted.

*so mechanical or routine ... no creativity whatsoever*

The initial characterization of the absence of creativity follows the dismissal of industrious collection in the collection and assembly of data as a criterion for copyright.

The question that remains is whether Rural selected, coordinated, or arranged these uncopyrightable facts in an original way.

...

the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. (Feist, 1991, p.362)

The crucial clause characterizing the ‘no creativity whatsoever’ is ‘so mechanical or routine’. The ‘so mechanical or routine’ is, then, equated with the complete absence of creativity, ‘no creativity whatsoever’. As such, it constitutes a characterization of the absence of creativity in its strongest or most central sense. The meaning of the content bearing terms, ‘mechanical’ and ‘routine’ and the relation between them needs to be considered.

Neither *mechanical* nor *routine* occur elsewhere in the decision, and in their unique occurrences, are not accompanied by citations or other indications of intended specialized or technical senses. They can then be understood in their ordinary discourse senses. These can be illuminated by definitions taken from a monolingual dictionary, understood as a register of acceptable usages. A culturally and chronologically proximate source is, *Webster's Third New International Dictionary of the English Language*, in its immediately preceding edition.

Mechanical is there defined as, ‘done as if by a machine: seeming uninfluenced by will or emotion: automatic, involuntary’ (Webster, 1981). The clause, ‘done as if by a machine’, is given first in the definition, with the other and subsequent clauses acting as elaborations or illuminating qualifications on it. The sense, ‘done as if by machine’ can then be regarded as the primary meaning of mechanical in ordinary discourse and adopted to interpret its occurrence in the decision. The qualification within the definition, ‘*as if* by machine’, implies the inclusion of processes conducted by direct human work, but by a human acting mechanically, and of direct machine work. The qualifier ‘so’ in ‘so mechanical or routine’ applies directly to ‘mechanical’ and indicates that the term is to be understood in its most intense sense. It could also legitimately be understood as qualifying ‘routine’. The definition of routine, as an adjective corresponding to its use in the decision, is, ‘of a commonplace or repetitious character: ordinary, usual’ (Webster, 1981), and this sense can also be adopted. ‘[S]o mechanical’ and ‘routine’, then, are distinct in meaning, although they have a common referent in the complete absence of creativity.

The linking of semantically distinct terms by ‘or’ does not strike a native reader of written English as dissonant, but emerges as unusual when compared with other occurrences of *or*



within the decision and with its customary use in written English. The expression *or* is used within the decision with semantically overlapping adjectives or adjectival clauses for instance, ‘humble or obvious’, ‘utterly lacking or so trivial’ (Feist, 1991, pp.345, 359). *Or* in ordinary modern English language written discourse is similarly most commonly used to semantically strongly overlapping terms (Stanford, 2008). The unusual linking of semantically distinct terms is significant as it affects the relation and the preferred logical translation for the ‘so mechanical or routine’.

The expression *or* which occurs in the decision has been translated from discursive prose into formal logic in two contrasting ways. In early modern logic, with Boole (1854), it was translated as an exclusive disjunction ((p AND NOT- q) OR (NOT- p AND q)) but this was subsequently transformed into an inclusive reading (p OR q)<sup>6</sup>. The inclusive reading includes the exclusive disjunction but also includes the conjunction or AND. The crucial point of difference is then the inclusion or exclusion of the conjunction. Studies suggest that uses of *or* corresponding to exclusive disjunction in ordinary language are not common and that it is normally inclusive (Stanford, 2008). With formulations with semantically overlapping terms, the expectation would be that the overlap or conjunction of the terms would normally describe most of the referents to be included, with some few only having one characteristic of belonging to the exclusive disjunction of the terms. ‘[S]o mechanical or routine’ contrasts with such uses, as the content bearing terms are semantically relatively distinct rather than immediate alternatives. The expression ‘or’ in the decision would normally predispose a logical translation towards an inclusive reading, but this predisposition must be qualified by the unusual semantic distinctness of the terms.

The particular logical translation for the ordinary language clause ‘so mechanical or routine’ is crucial as it leads to highly significant contrasts in the scope of the absence of creativity. The most extensive semantic scope would be given by logical OR, with conjunction, and exclusive disjunction more restricted, and negation as excluding all cases. Alternatives can be progressively considered and eliminated.

- Negation. Negation of both terms can be definitively eliminated from a reading of the ordinary language expression ‘or’ as either an exclusive disjunction or as inclusive.
- Exclusive disjunction. A reading which was intended to be restricted to exclusive disjunction could have been easily marked, without departing from ordinary language. An exclusive disjunction could have been phrased as ‘[either] so mechanical or routine’ without loss of clarity or a departure from ordinary discourse. The commonality of reference, to the absence of creativity, also does not favor reading as an exclusive disjunction, which would normally require two separate referents, or a single referent with a dual aspect, to remain true when one term does not apply. Semantically, OR as an exclusive disjunction can be used for exclusive or contradictory terms. The terms *mechanical* and *routine* were not semantically contradictory or exclusive, on the reading established here. A reading of ‘or’ in ‘so mechanical or routine’ as exclusive disjunction is, then, not favored, by a reading of the expression, reference, or semantics of the decision
- Inclusive. The expression *or* was used elsewhere within the decision in a clearly inclusive sense, but for semantically overlapping rather than distinct terms. The

interaction between expression and meanings, then, weakens the case for a similar, clearly or fully, inclusive readings. The single referent, the absence of creativity, also does not favor the inclusion of a reading as an exclusive disjunction. An inclusive reading can, then, be accepted, in accord with modern practice, but only weakly, if at all, including exclusive disjunction, which has already been rejected as a sole reading.

- Conjunction. Conjunction, which was included in the modern inclusive translation of *or*, emerges as the only remaining possibility. Conjunction, or AND, must, then, be endorsed, as the preferred translation. The absence of a semantic contradiction between the terms, on the meanings established, allows for a conjunct reading (a contradiction would normally debar a conjunct reading).

The absence of creativity is, then, best understood as something which is both *so mechanical* and *routine*, with the qualifier ‘so’ applying directly and strongly to the mechanical (See Figure 1).

In summary, then, both ‘mechanical’ and ‘routine’ could, then, be understood in central ordinary discourse senses. Intensity was conferred on the mechanical by *so* and a relation of conjunction between ‘so mechanical’ and ‘routine’ was the preferred logical translation.

*entirely typical ... devoid of even the slightest trace of creativity*

The decision then continues to characterize the selection, coordination, and arrangement of Rural’s white pages as below ‘the minimum constitutional standards for copyright protection’, ‘devoid of even the slightest trace of creativity’ (Feist, 1991, p.362). The characterization is, then, of the extreme absence of creativity, continuous with and highly similar to the immediacy previous invocation of ‘no creativity whatsoever’ (Feist, 1991, p.362). The extreme absence of creativity is now further characterized:

Rural’s white pages are entirely typical ... a garden-variety white pages directory (Feist, 1991, p.362)

The senses of ‘entirely typical’ and ‘garden-variety’ and their relation to each other and to the ‘so mechanical or routine’ need to be considered.

The meaning of *typical*, although not of *garden-variety*, can be elucidated from its other occurrences within the decision. Two senses of typical, consistent with its ordinary discourse usage, can be detected, frequently occurring and representative of a type (also present in more technical usage, for instance when referring to a token of a type). The opening of the decision characterizes Rural’s product as a ‘typical telephone directory’ (Feist, 1991, p.342). Feist’s directory, by contrast, is not typical in this sense – ‘[u]nlike a typical directory’ (Feist, 1991, pp.342-343) – but is still characterized as typical in a further sense, ‘a typical Feist listing’ (Feist, 1991, p.344). With regard to the extreme absence of creativity, the decision refers back to the initial characterization of Rural’s directory – ‘as mentioned at the outset’ (Feist, 1991, p.362) – and then characterizes Rural’s white pages as ‘*entirely typical*’ (Feist, 1991, p.362). *Typical* within the decision then has a distinct and stronger meaning when applied to Rural’s white pages compared with Feist’s directory. For the extreme absence of creativity, ‘entirely typical’, must be understood as both frequently occurring and representative of its type, with

both senses combined in the stronger meaning. ‘[G]arden-variety’ is a unique occurrence and can be understood in its ordinary discourse senses, with a similar meaning to the stronger sense of typical. A semantic parallelism is also implied by the proximity and common structure of the sentence in which they occur.

The similarity in meaning between ‘entirely typical’ and ‘garden-variety’ implies that would cover contiguous and overlapping domains in a semantic or intellectual space. The commonality of immediate reference, to Rural’s white pages directory, and, more strongly, of deeper conceptual reference, to the extreme absence of creativity, strengthens the case for their contiguity and overlap. An inclusive or OR reading of the relation between ‘entirely typical’ and ‘garden-variety’ is then strongly preferred, with the further expectation of significant overlap or commonality between them (See Figure 2).

The relation of ‘entirely typical’ and ‘garden-variety’ to the previous, and possibly encompassing, characterization of the absence of creativity as ‘so mechanical or routine’ can also be considered. The clauses are closer in meaning to the routine than to the mechanical. *Typical* needs to be understood as both frequently encountered and representative of its type, as ‘entirely typical’, fully to belong to the routine. The clauses can be regarded as explicating, although not exhausting or fully occupying, the routine. In an approach to a stricter logical formulation, they could be conceived as a list of species—although without clear differentia between the species—for the genus, routine. Classically, from Aristotle, it is ‘more informative and apt to give the species than the genus’, and, further, ‘the genera can be predicated of the species but the species are not predicated reciprocally of the genera’ (Aristotle, 323 BC/1989, p.7). The OR reading of the relation between the clauses is strengthened by the consideration of the clauses as species of a genus. The conjunction of the ‘so mechanical’ with the routine is not disturbed. On the level of expression, ‘routine’ is closer to the clauses than ‘so mechanical’. They further explicate the routine, without disturbing the conjunction of the routine with the mechanical.

In summary, then, ‘entirely typical’ and ‘garden-variety’ characterizing the extreme absence of creativity, could be understood in central ordinary discourse senses. The terms could also be understood as in an OR relation to each other and as explicating the routine.

*could not be more obvious ... the most basic information ... lacks the modicum of creativity ... insufficient creativity*

The decision is next concerned with selection alone, rather than with the coordination or arrangement imposed upon the selected items. The nature of selection involved is qualified – ‘selection’ of a sort – and regarded as ‘lack[ing] the modicum of creativity’ and involving the expenditure of ‘insufficient creativity’, to qualify as original. The characterization of the absence of sufficient creativity is, then, slightly more temperate than the previous passages, invoking not its complete absence but the absence of a sufficient modicum. The selection is further characterized as ‘could not be more obvious’ and as resulting in ‘the most basic information’ (Feist, 1991, p.362-363).

*Obvious* occurs elsewhere in the decision, in quotations, as self-evident and can be similarly interpreted here (Feist, 1991, pp.345, 359. *Basic* is used both as fundamental – ‘basic copyright principles’ (Feist, 1991, p.354) – and as simple or the lowest possible level – ‘basic subscriber information’ (Feist, 1991, p.363) – and simple and lowest possible level can be understood here. Information in compilations is consistently differentiated from data, intensely from ‘raw data’ (Feist, 1991, p.361), as data organized into a more coherent form. ‘[M]ost basic’ in conjunction with ‘information’ then implies data which has been subject to a simple transformation into information.

The similarity in meaning between the significant clauses coupled with their syntactic parallelism – ‘Rural’s selection of listings could not be more obvious: it publishes the most basic information’ – and the commonality of the proximate referent – ‘selection’ of a sort – and of the underlying referent, of insufficient creativity, implies that they are closely related alternatives to each other, corresponding to an inclusive OR (see Figure 3). ‘[O]bvious’ and ‘most basic’ are cognate with the routine but also with the mechanical, particularly when we are concerned with mechanical reasoning (Babbage, 1989, pp.246-247). The clauses can then be understood as belonging to the conjunction of the ‘so mechanical’ and the ‘routine’.

In summary, then, the invocation of the absence of sufficient creativity is slightly less harsh than the previous passages. All the terms characterizing the absence of a sufficient modicum of creativity, ‘could not be more obvious’, ‘the most basic information’, could be understood in their ordinary discourse senses. The clauses stood in an OR relation to each other and explicated the conjunction of the mechanical and the routine.

#### *dictated by state law*

The treatment of selection is further developed, directly in connection with not meeting the originality requirement:

We note in passing that the selection featured in Rural’s white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly ‘select’ to publish the names and telephone numbers of its subscribers; rather, it was required to do so by the Kansas Corporation Commission as part of its monopoly franchise. ... Accordingly, one could plausibly conclude that this selection was dictated by state law, not by Rural. (Feist, 1991, p.363) <sup>7</sup>

The qualifications, ‘note in passing’ and ‘another reason’, indicate a slight digression and have significant implications for the exegesis. They imply that crucial terms need not be closely semantically connected with the other clauses. The reference of the passage is directly to the ‘originality requirement’ rather than to the absence of creativity, although both the conception of originality and the continuity with the discussion of ‘selection’ in the previous paragraph as embodying ‘insufficient creativity’, would imply that failing the originality requirement is conceived as including the absence of creativity.

‘[D]ictated by state law’ is the crucial positive clause. The particular sense of ‘dictated’ can be inferred from its context and its occurrence elsewhere in the decision. ‘[D]ictated’ is used elsewhere in the decision, again in connection with law, ‘the statute dictates’ (Feist, 1991, p.358). ‘[D]ictated’ can then be understood as an intense form of specification, with intensity

semantically contained within the primary term, *dictated*, rather than added by a qualifier, in contrast to the previous formulations. '[S]tate law' refers to law, state rather than federal, imposed on the process of selection, from outside that process. Both 'dictated' and 'state law' can then be understood in central ordinary discourse senses. Contained within a single clause, the relation between 'dictated' and 'state law' can be read as a conjunction (See Figure 4).

The relation of the clause, 'dictated by state law', to the 'so mechanical or routine' can be considered. The intensity of 'dictated' confirms the intensity conveyed by the 'so mechanical', while state law would exemplify the routine as commonplace, ordinary, or usual. Rather than being associated primarily separately with either the 'so mechanical' or the 'routine', the clause as a whole can be understood as exemplifying, although not fully or exclusively occupying, the conjunction of the 'so mechanical' with the 'routine', within the umbra of the absence of creativity. The reading of 'so mechanical or routine' as a conjunction is thereby supported. The 'so mechanical or routine' and the absence of creativity can now be further understood to include, as a centrally characteristic referent, the carrying out of a process in strict conformity with a well known law externally derived and imposed.

In summary, then, the content bearing terms in 'dictated by state law' can be understood in their central ordinary discourse senses. '[D]ictated' and 'state law' are in conjunction with each other. The clause can be understood as referring to one instance of the conjunction of the 'so mechanical' with the 'routine'. The initial qualifications, 'we note in passing' and 'another reason', imply a slight digression and that the clause need not be highly closely semantically related to the other, preceding and subsequent, clauses.

*nothing remotely creative ... age-old practice ... time-honored tradition ... does not possess the minimal creative spark*

The concluding paragraph treats the absence of creativity in a series of consecutive rather than separated clauses.

But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. ... It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution. (Feist, 1991, p.363)

An extreme absence of or antithesis to creativity is again at issue, initially as 'nothing remotely creative', and, in conclusion, as 'not possess[ing] the minimal creative spark required' (Feist, 1991a, p.363).

The initial clauses positively delineating the absence of the 'minimal creative spark', from *age-old practice* to *expected as a matter of course* are, in contrast to previous passages, grouped directly and closely contiguous to one another, with the subsequent clauses, *practically inevitable* to *time-honored tradition*, similarly grouped. The clauses represent the most connected positive delineation of the absence of creativity in the decision. The crucial clauses can be extracted, with their sequence preserved:

an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course ... practically inevitable ... time-honored tradition (Feist, 1991, p.363)

Collectively, the clauses constitute the most extensive resource offered by the decision for an exegesis of insufficient levels of creativity.

The positive terms in the relevant clauses are not accompanied by immediate citations, or otherwise indicated to have technical or specialized meanings, and must then be understood in their ordinary discourse senses. The absence of other occurrences in the decision offers no immediate resource for elucidation. They are semantically dominated by a historical reference or resonance, incorporating a very extensive chronological reference. '[A]ge-old' refers to a very long duration, not confined to any particular historical period, and transcending historical variation and periods. The particular practice of alphabetic arrangement, to which reference is made, has a very long history, embodied in the term, alphabet (alpha, beta) (Harris, 1986). '[A]ge-old' could then be understood as reaching to at least the emergence of written alphabetic literacy. '[F]irmly rooted in tradition' implies repeated over historical time and could even be read to imply the arbitrary nature of the ordering, in which the initially arbitrary becomes the traditional. '[S]o commonplace that it has come to be expected as a matter of course' reveals the historical becoming the everyday, a process which has been understood as naturalization (Berger and Luckmann, 1966). With 'practically inevitable', the historical is beginning to merge into the natural and the inescapable. The repetition of *tradition* and its presence in the concluding clause — 'time-honored tradition' — is suggestive of the significance attached to tradition for characterizing the absence of creativity. Long duration and transcendence of particular historical periods are then central to the characterization of the absence of creativity. Semantically, the clauses are complementary, although not identical, to one another and could be conceived as overlapping.

The relation between clauses and their most appropriate logical translation needs also to be considered. The initial clauses are separated by a comma or by *and* and subsequent clauses are in separate sentences. The expressive structure is suggestive of parallelism between clauses, consistent with their similarity in meaning. The single referent, of the absence of creativity, continues. On the basis of their overlapping semantics, the suggestions of the parallelism conveyed by the expression, the continuity of a single referent, the relation between constituent clauses can be read as fully equivalent to logical OR, in the modern inclusive sense. Other passages in the decision containing clauses separated by commas can also plausibly be read as embodying an OR relation between constituent clauses. The single referent and the semantic overlap of the clauses yields the further expectation that real world instances of the absence of creativity would be describable by more than one clause (corresponding to the conjunction, or AND, contained within inclusive OR) (See Figure 5).

The relation of the clauses to the 'so mechanical or routine' can also be considered. Semantically, the clauses are closer to the routine than to the mechanical and can be regarded as further amplifying 'routine', giving it a historical scope and resonance. In an analogy to the understanding established for the 'entirely typical ... the most basic information' the series of clauses, 'age-old practice ... time-honored tradition', can be regarded as a further, and still not necessarily exhaustive enumeration of species, conceived as overlapping rather than sharply differentiated, of the genus, routine. Their historical resonance exposes the 'entirely typical'

and its associated clauses as semantically ahistorical although with a contemporary reference, in a standard directory.

The routine now emerges as mediating between the mechanical and the historical, with particular mechanical processes becoming routine through their recurrence over time. The mechanical, routine, and historical can then be understood as points along a continuum, counter to the commonly encountered opposition of the mechanical, conceived as industrial machinery and studied by engineering disciplines, to history, with history understood referentially to include pre-industrial periods and as part of the human sciences. '[R]outine', which combined with 'mechanical', can now be understood as mediating between the mechanical and the historical.

In summary, then, the conclusion to the characterization of insufficient levels of creativity offers the richest resource for exegesis. Terms within clauses could be understood in their central ordinary discourse senses and had an extensive historical scope and very strong historical resonance. Clauses could be understood in as complementary and overlapping. They primarily amplified 'routine' in 'so mechanical or routine' and could be understood as species of the routine. They exposed the ahistorical semantics and contemporary reference of the previous amplification of the routine. The routine further emerged as mediating from the mechanical to the historical.

### *Summary*

A more concise, and, accordingly, more immediately intelligible, characterization of the extreme absence of creativity can now be constructed. Crucial descriptive clauses isolated can be recalled, in their entirety, with the distinctions between groups of clauses retained:

so mechanical or routine

entirely typical ... garden-variety

could not be more obvious ... the most basic information

dictated by state law

an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course ... practically inevitable ... time-honored tradition (Feist, 1991, pp.362-363)

Crucial terms within clauses were not specialized or technical, nor immediately amplified by citations to cases, statute law, or the Constitution or its interpretations, and could then be understood in their ordinary discourse meanings. The particular senses of terms could be elucidated from their immediate context, and, where terms occurred elsewhere in the decision, this could be used as a further resource for explication. In all instances the occurrence of terms within the crucial passages in central ordinary discourse senses was confirmed.

The relations within and between groups of clauses which have already been indicated can now be used to construct a synthesis of the characterization of the absence of creativity as a whole.

### *Synthesis*

A discursive expression of the synthesis can first be given. The initial clause, ‘so mechanical or routine’, directly and distinctively characterizes ‘no creativity whatsoever’ (Feist, 1991, p.362). Some priority is given to ‘mechanical’, by citing it first and with a qualifier directly conferring intensity upon it. The intermediate characterizations of insufficient levels of creativity as ‘entirely typical ... garden-variety’ amplified the routine without exceeding or transgressing its semantic scope or creating a tension or contradiction with the ‘so mechanical’. The characterization of ‘insufficient creativity’ as ‘could not be more obvious ... the most basic information’ explicated the routine but also had some connotations connecting it with conjunction of the mechanical with the routine. The clause, ‘dictated by state law’, could be understood as a single clause with differentiable aspects. ‘[D]ictated’ directly amplified the ‘so mechanical’ and ‘state law’ the ‘routine’, while the clause as whole exemplified the ‘so mechanical or routine’. The final sequence — ‘an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course ... practically inevitable ... time-honored tradition’ (Feist, 1991, pp.362-363) — historicized the routine. The historical resonance of the conclusion exposed the earlier sequence of clauses, from ‘entirely typical’ to ‘most basic information’, as a contemporary amplification of the routine. The routine, in its ordinary or not immediately historical sense, also mediated between the mechanical and the routine. Subsequent clauses, then, amplified the initial characterization of the extreme absence of creativity as ‘so mechanical or routine’, without entering into tension or contradiction with the initial terms.

Support for the synthesis derived from aggregating or combining the readings established for constituent clauses can be derived from considering the passage as a whole. The passage consists of a consecutive sequence of connected paragraphs. A common rhetorical strategy for prose exposition can be detected, of an indicative opening, which may be brief but which contains the kernel, and, possibly, the limits, of what is to be expanded or developed, some intermediate observations, and a summative conclusion, fuller than the indicative opening but without exceeding the initially established boundaries. It would be legitimate, on the basis of the detectable structure, to regard the opening clause as strongly characterizing the absence of creativity, the intermediate passages as consistent and amplifying the initial themes, and the final sequence of clauses as a summative conclusion. The initial invocation of the ‘so mechanical or routine’ can be regarded as an encompassing statement which attempts to set precise boundaries for the concept of insufficient levels of creativity, but which still be further internally amplified or made fuller. The continuity of a single referent, of the absence of or antithesis to creativity, supports the semantic cohesion and absence of significant tension or contradiction detected. A single referent also legitimates the treatment of the passage as a single or highly connected passage. The semantics established remains largely unaffected for the meanings of individual terms, but the mediating role of the routine between the mechanical and the historical is confirmed. From the expression, reference, and semantics of the passage as a whole, the initial characterization of the absence of creativity as ‘so mechanical or routine’ can be regarded as shared or inherited by the subsequent clauses.

A more formally logical account can be developed. The ‘so mechanical or routine’ remains dominant with a conjunction as the preferred relation between the constituent terms. The



priority accorded to mechanical can be retained, by citing the relation as ‘so mechanical AND routine’<sup>8</sup>. The sequence of clauses, ‘entirely typical ... garden-variety ... could not be more obvious ... the most basic information’, primarily amplify the routine, and can be considered as more informative species, giving a rise to a relation of material implication to the routine. ‘[D]ictated by state law’ belong to the conjunction of the so mechanical and routine, which can similarly be expressed as material implication. ‘[A]ge-old practice ... time-honored tradition’ also amplify and substantiate the routine and can be expressed as material implication. The overall logical synthesis can be expressed as a sequence of logical clauses (See Figure 6) and in a diagrammatic representation (See Figure 7).

An economical and comprehensive synthesis has, then, been developed, fully incorporating the readings of clauses considered separately. The synthesis could similarly be discursively and logically expressed. The reading derived from combining the established readings was supported by a consideration of the passage as whole. ‘[S]o mechanical or routine’ was the dominant clause, indicating the limits of the absence of creativity, with further clauses amplifying but not exceeding or transgressing the initial statement. The mechanical emerged as consistent, with, rather than antithetical to, the historical, with the routine mediating between mechanical and historical. A clear conception of the absence of creativity, and hence of uncopyrightability, has then been established.

What value can be attached to the exegesis established of the absence of creativity? The overall characterization of the absence is constituted by terms from ordinary discourse, used in unexceptionable senses, which promises the congruence desired by commentators between concepts from copyright with everyday understandings. Considerable progress has then been made in the exegesis, but there could still be argument and disagreement over the meaning of the terms given in the exegesis, and with regard to the assignment of instances of selection, coordination, and arrangement to the categories constructed. An advance in elucidation could be made, and the potential for such dispute greatly reduced, if the terms in the exegesis with could be correlated with something more definitively understood, capable of yielding discriminations between instances to be excluded and included, and of compelling contemporary significance.

## Correlation

A strong analogy can be made between the delineation of the absence of creativity in the decision and classic conceptions of computability.

It seems that this importance [of Turing's computability] is largely due to the fact that with this concept one has for the first time succeeded in giving an absolute definition of an interesting epistemological notion, i.e., one not depending on the formalism chosen. In all other cases treated previously, such as demonstrability or definability, one has been able to define them only relative to a given language, and for each individual language it is clear that the one thus obtained is not the one looked for. (Gödel, 1946/2004, p.84).

A gestalt, or overall, effect of correspondence can be sensed, which can be refined and reinforced by specifying particular correlations within the overall analogy.

‘[M]echanical’ in ‘so mechanical or routine’ can be correlated with a *mechanical* procedure or algorithm, at the level of both expression and content, or signifier and signified. ‘[S]o’ further implies an *automatic* mechanical procedure, customarily regarded as the purest or extreme form of a mechanical procedure. The interpretation of dictated as implying the execution of a process in strict conformity with a law externally imposed strengthens the correlation with an automatic mechanical procedure. The distinction of information from data implicit in the decision is consistent with explicit and widely diffused understandings developed from computational contexts, where information is regarded as data organized to some purpose (Blair, 2002), slightly reinforcing the correlation of the ‘mechanical’ in the decision with a mechanical procedure.

The historical resonance of the clauses — ‘an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course ... practically inevitable ... time-honored tradition (Feist, 1991, pp.362-363) — correlates with the underlying conception of computability which pre-existed the full articulation and formalization of models of the computable process as a mechanical procedure (Gödel, 1958/1990, p.245)<sup>9</sup>, and which remains valid (Herken, 1995). Classically, computability was conceived as ‘what would naturally be regarded as computable’ (Turing, 1936-1937/2004, p.135) and as an ‘intuitive’ concept (Church, 1936/2004, p.90). The ‘naturally regarded’ and the ‘intuitive’ correspond to the historical resonance and reference of the description of the absence of creativity in the decision. There is a contrast between the natural in conceptions of computability and the historical in the decision. However, the sharpness of this contrast is mollified by the long duration in the conception of the historical. Its independent significance is also reduced by recognizing the encompassing contrast between the humanist and historical mindset of the law and the inheritance in conceptions of computability from Platonism, which would treat mathematical propositions as objectively or naturally given. A residual contrast between the natural and historical remains.

The conjunction of the ‘so mechanical’ with the other aspect of the routine in the decision, as ‘entirely typical ... garden-variety ... could not be more obvious ... most basic information ... state law’ (Feist, 1991, pp.362-263), which was more in accord with the ordinary sense of routine, can now be restored. The absence of creativity is then manifested in a routine selection, coordination, and arrangement produced by an automatic mechanical procedure. The understanding is sufficiently significant to demand isolation, repetition, and emphasis:

**The absence of creativity is manifested in a routine selection, coordination, and arrangement produced by an automatic mechanical procedure.**

A clear and sufficient understanding of below the necessary minimal degree of creativity has, then, been obtained.

The distinction between typical as representative of a type and typical as frequently occurring, with ‘entirely typical’ strongly carrying both senses, then obtains a specific significance. A novel selection, coordination, and arrangement produced by an automatic mechanical procedure would not, at its first occurrence, be typical either as representative of its type or as frequently occurring. However, as the product of a mechanical procedure, it is potentially

replicable; if replicated, it becomes typical as representative of a type; if then applied to sufficient other sets of data, it becomes typical in its full sense of representative of a type and as frequently occurring.

The correlation of the ‘so mechanical’ in the absence of creativity with an automatic mechanical procedure promises a further congruence with everyday practice as well as with ordinary discourse. The strong exegesis and elucidation of the ‘so mechanical and routine’ gives the decision potentially concentric, rather than not mutually co-centered, effects, by establishing the umbra of uncopyrightability, and this equivalence could have useful real world effects. The correlation can be given a pivotal role in a further interpretation, rather than just exegesis, of the decision as whole. The equivalence established between the absence of creativity and the routine product of an automatic mechanical procedure has implications for creativity, and hence for copyrightability, for a renewed understanding of the original. The crucial components of these implications can be selectively and summarily anticipated.

## Implications

For copyrightability, in distinction from uncopyrightability, a modicum of creativity is required. Two criteria for the otherwise unexplicated concept of a modicum of creativity can be found in the decision. First, that it should embrace very low levels of creativity.

the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be. (Feist, 1991).

Secondly, that it should have a demarcatable, possibly quantifiable, lower limit, ‘a *de minimis* quantum of creativity’ (Feist, 1991, p.363).

Creativity, understood as a constituent of a modicum of creativity, needs first to be clarified. If the extreme absence of creativity is identified with a selection, coordination, or arrangement produced by an automatic mechanical procedure, creativity can then be found in such products which are not automatically mechanically produced. A distinction made in discussions of computability identifies the least sufficient difference:

the question of whether there exist finite non-mechanical procedures not equivalent with any algorithm, has nothing to do with the adequacy of any definition of ‘formal system’ and of ‘mechanical procedure’. ... such as those which involve the use of abstract terms on the *basis of their meaning*. (Gödel, 1964/2004, p.72). [emphasis added]

*Meaning* is then the crucial discriminating factor. In establishing meaning as the criterion for creativity, the residual contrast between the historical in the decision and the natural in characterizations of computability has been transformed into a basis for explanation, by not conceiving the human mind, including human action on meaning, in computational terms, for instance, as a finite automaton.

The absence or presence of creativity, understood as human activity on meaning, may have to be determined or read from the product in cases where it is disputed. Such reading would be a variation on and development of an established practice in copyright disputes – ‘it is generally

not possible to establish copying as a factual matter by direct evidence' (Nimmer, 2009, 13.01[b]). To determine the absence of creativity, or production by an automatic mechanical procedure, recourse can be made to established understandings of the limits of mechanical procedures, to what would naturally be regarded as computable. There is also the possibility of more empirical testing, including considering the feasibility of producing highly similar products by a mechanical procedure (broadly, reverse engineering).

The conception of creativity meets the requirements for a low level of creativity and a demarcatable lower limit. Consideration of meaning represents a low level of creativity (it would, for instance, be revealed in choosing between different words from a spell checker). Such human activity on meaning has significant duration, intensity, specialization, and level within specialized domains. Costs are associated with each of these factors and with their combination. For a copyrightable product, they must be resolved into a fixed and reproducible product, which can then be connected with certain exchange values. A demarcatable lower limit for creativity can then be understood in terms of the exchange values connected with the product. Exchange value as an indicator of a modicum of creativity is congruent with the pivotal component of a classic test for creativity:

if they command the interest of any public, they have a commercial value,-it would be bold to say that they have not an aesthetic and educational value,- and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment (Bleistein, 1903, p.252).

Exchange value corresponds to the 'ultimate fact' of the 'taste of any public' mediated by its 'commercial value'. The presence of a sufficient modicum of creativity can then be determined by a consideration of the exchange values connected with any human activity on meaning.

The tension in the decision between the explicit and dominant refutation of the labor theory of copyright – 'copyright rewards originality, not effort' (Feist, 1991, p.363) – and the continuing, although less emphasized, allowing of property to subsist in the products of intellectual labor – [t]he writings which are to be protected are the *fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like (Feist, 1991, p.346) [emphasis in original] – can first be raised to a contradiction and then dissolved. Property can be allowed to subsist in the products of creative intellectual labor, understood to include routine, but not mechanical, intellectual labor, while property can be denied to the products of mechanical processes (whether directly conducted by machine as a machine process or by human work as organic labor).

## Conclusion

The significance of the decision has been sustained, but the potential for multiple interpretations – 'not necessarily concentric [...] consequences' (Raskind, 1992, p.331) – reduced. The Delphic character of the decision has been diminished by a close reading and by the correlation indicated. A clear and sufficient understanding of the absence of sufficient creativity was established. Implications for creativity and a modicum of creativity, and hence for originality and copyrightability, followed simply and compellingly from the conception of the absence of sufficient creativity. The argument has then given the treatment of the absence of creativity the full pivotal function implied by its position and role within the decision. Concepts and tests

established for the absence of creativity, for creativity, and for a modicum of creativity have the desired congruence with ordinary discourse, and further, with everyday practice. Drawing solely on distinctions made within the decision, on concepts embedded in ordinary discourse and in scholarly disciplines as founding assumptions, using only methods of study, of careful textual exegesis and correlation, validated by their long history, the argument has arrived at an elucidation of a central component of the decision and the most compelling, significant, finally simple, and potentially practically useful interpretation of the decision as a whole, since its publication.

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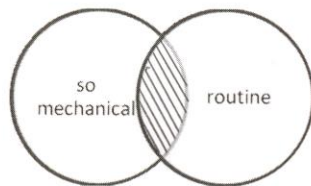
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*so mechanical or routine*

1. so mechanical
2. routine
3. (so mechanical) AND (routine)



**Figure 1.** Logical representation of *so mechanical or routine*.

1. entirely typical OR garden-variety

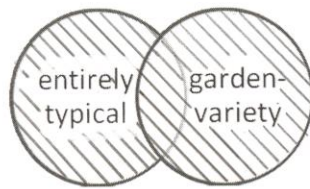


Figure 2. Logical representation of *entirely typical* ... *garden-variety*.

1. could not be more obvious OR the most basic information

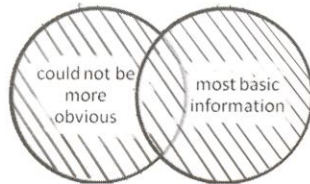


Figure 3. Logical representation of *could not be more obvious ... the most basic information*.

*dictated by state law*

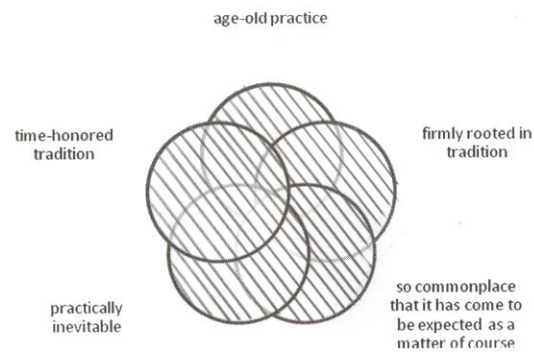
1. dictated by state law



Figure 4. Logical representation of *dictated by state law*.

*an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course ... practically inevitable. ... time-honored tradition*

1. an age-old practice OR firmly rooted in tradition OR so commonplace that it has come to be expected as a matter of course OR practically inevitable OR time-honored tradition

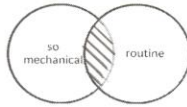


**Figure 5.** Logical representation of *an age-old practice ... time-honored tradition*

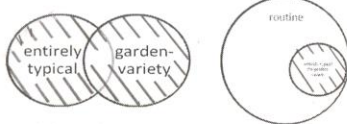
1. so mechanical
2. routine
3. (so mechanical) AND (routine)
4. (entirely typical) OR (garden-variety)
5. ((entirely typical) OR (garden-variety)) -> (routine)
6. (could not be more obvious) OR (most basic information)
7. ((could not be more obvious) OR (most basic information)) -> ((so mechanical) AND (routine)).
8. (dictated by state law)
9. (dictated by state law) -> ((so mechanical) AND (routine)).
10. (an age-old practice) OR (firmly rooted in tradition) OR (so commonplace that it has come to be expected as a matter of course) OR (practically inevitable) OR (time-honored tradition)
11. ((an age-old practice) OR (firmly rooted in tradition) OR (so commonplace that it has come to be expected as a matter of course) OR (practically inevitable) OR (time-honored tradition)) -> (routine mediating to mechanical).
12. (so mechanical) AND (routine)

**Figure 6. Logical representation of the overall synthesis for insufficient creativity**

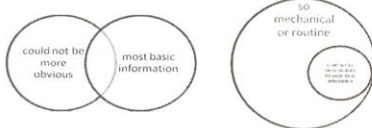
*mechanical or routine*



*entirely typical ... garden-variety*



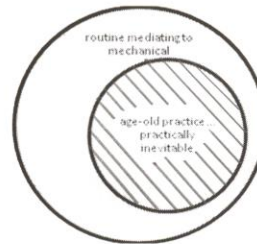
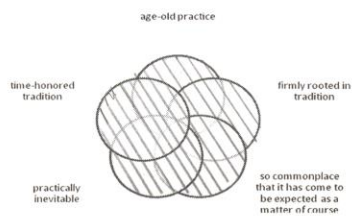
*could not be more obvious ... most basic information*



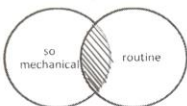
*dictated by state law*



*an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course ... practically inevitable. ... time-honored tradition*



*so mechanical or routine*



**Figure 7. Diagrammatic representation of the overall synthesis for insufficient creativity.**



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<sup>1</sup> The judgment in *Ager v. Peninsula* invokes the ‘usual test ... [of] time and labour in compilation’ (*Ager v. Peninsula*, 1884, p.642), exemplifying late 19<sup>th</sup> century United Kingdom judicial understanding of copyright. The case was concerned with property in ciphers compiled for use in telegraphy.

<sup>2</sup> The judgment may be Delphic, not only in the presumably intended meaning of being difficult to interpret, but in a more radical etymological sense, of commentators begin debarred from questioning the producer of the significant utterance about its underlying meanings or intentions. The limited dialogue between questioner and responder at the oracle at Delphi normally allowed no direct sensory or visual contact between the questioner and responder. Questioning of the oracular utterance delivered was forbidden at Delphi and other oracles. The priestess’ voice was changed for response to enquiries. Our knowledge of the oracle at Delphi is incomplete and is derived from archaeological evidence and, primarily, literary sources (Parke and Wormell, 1956; Price, 1985; Bremmer, 1987; Aune, 1987).

In contrast to legislation, a Supreme Court judgment does not give a specific statement of intentions or intended effects, beyond the interpretation of the constitution (Fallon, 2004), and these may have to be reconstructed.

<sup>3</sup> The ‘ratio decidendi’ can be understood as the ‘principle that determine[s] the outcome of a case [which] ... becomes the ground upon which decisions in future cases will rest’ (Greenberg, 1997, p.47).

<sup>4</sup> A reviewer agrees with this underlying position and that reacting to Supreme Court options is common among faculty, but indicates that this constitutes their livelihood in a sense. Another colleague with knowledge of the literature of legal scholarship had previously endorsed the position and also communicated that legal scholars were trained in the analysis, comparison, and critique of judicial opinions, but that they were reluctant to engage with extra-legal material.

<sup>5</sup> The process of close textual exegesis is appropriate to counter the Delphic character of the judgment. Exegesis can be glossed as recovering the meaning of written, particularly sacred, written texts. Etymologically, the term can be traced to the ‘exegetai’, interpreters who used to gather at the entrances to oracles and who also interpreted law and omens (Aune, 1987, p.86; Oxford, 1989).

<sup>6</sup> Consider the parody of the use of *or* as an exclusive disjunction by Lewis Carroll.

‘It’s long,’ said the Knight, ‘but very, *very* beautiful. Everybody that hears me sing it—either it brings the *tears* into their eyes, or else—’

‘Or else what?’ said Alice, for the Knight had made a sudden pause.

‘Or else it doesn’t, you know.’

(Carroll, 1871/1998, p.213).

<sup>7</sup> Feist had contended that, ‘The listings do not evidence any selectivity. The white pages listings take the entire universe of data, and indeed, RTSC is required to publish all the data as part of its telephone service franchise’ (Feist, 1990, p.22).

<sup>8</sup> The expression ‘[so] routine AND so mechanical’ is logically equivalent but the priority given to the ‘so mechanical’ is lost.

<sup>9</sup> Kurt Gödel remarks, ‘As is well known, A. M. Turing, using the notion of a computing machine, gave a definition of the notion of computable function of the first order. But, had this notion not already been intelligible, the question whether Turing’s definition is adequate would be meaningless.’ (Gödel, 1958/1990, p.245).